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IN THE

Supreme Court of the United States

October Term, 1964

No. 430 1

MAX MANNY ELGISSER,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

	PAGE
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Constitutional Provision and Statutes Involved	2
Statement of the Case	3
The Indictment	3
The Record	4
The Pre-trial Suppression Motion	4
The Facts Adduced at the Hearing	5
The Trial	9
Reasons for Granting the Writ	10
Conclusion	13
Appendix—Opinion of the United States Court of Appeals	1a

Authorities Cited

Cases

Aguilar v. Texas, 378 U.S. 108	11
Henry v. United States, 361 U.S. 98	10, 11
Johnson v. United States, 333 U.S. 10	12

PAGE

Schaffer v. United States, 362 U.S. 511 ..... 2, 12

United States v. DiRe, 332 U.S. 581 12

Wong Sun v. United States, 371 U.S. 471 10-11

Statutes

18 U.S.C. 371 3
18 U.S.C. 659 ..... 2, 4
28 U.S.C. 1254(1) 1
18 U.S.C. 3052 ..... 3, 5, 10

Constitutional Provision

Amendment IV 2, 5

Rule

Rule 41(e) Federal Rules of Criminal Procedure .. 5

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Petitioner, MAX MANNY ELGISSER, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on July 7, 1964.

Opinion Below

The opinion of the Court of Appeals in this case has not yet been reported. This opinion is set forth as an appendix hereto, *infra.*

Jurisdiction

The judgment of the Court of Appeals was entered on July 7, 1964. A timely petition for rehearing was denied on July 27, 1964. The jurisdiction of this Court is invoked under Title 28, United States Code § 1254(1).

Questions Presented

The questions presented in this case are as follows:

1. Whether there was a proper showing of "probable cause" for petitioner's arrest without a warrant by federal agents, and whether petitioner's pre-trial motion to suppress evidence seized at the time of his arrest should have been granted.

2. Whether it was proper to continue the trial of petitioner, together with the other defendants, on the substantive counts of the indictment, following the entry of a judgment of acquittal on the conspiracy count at the close of the Government's case, and whether *Schaffer* v. *United States,* 362 U.S. 511, should be re-examined by this Court.

Constitutional Provision and Statutes Involved

The following constitutional provision and statutes are involved in this case:

AMENDMENT IV TO THE CONSTITUTION

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

TITLE 18, UNITED STATES CODE

> "§ 659. *Interstate or foreign baggage, express or freight.*
>
> "Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception

obtains from any railroad car, wagon, motor truck, or other vehicle, or from any station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express; or

"Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen."

"§ 3052. *Powers of Federal Bureau of Investigation*

"The Director, Associate Director, Assistant to the Director, Assistant Directors, inspectors, and agents of the Federal Bureau of Investigation of the Department of Justice may carry firearms, serve warrants and subpoenas issued under the authority of the United States and make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony."

Statement of the Case

The Indictment

The indictment in this case contained three counts. The first count alleged a conspiracy under Title 18, United States Code, § 371, to violate Title 18, United States Code, § 659 (theft from interstate movement of goods), among defendants William James Pitts, James Offie Cogdell, Edward James Manin, Max Manny Elgisser and Louis

Gladstein, from on or about December 1, 1961, until, as a practical matter, the arrest of the defendants on December 11, 1961. The second count alleged that on December 10, 1961, the defendants Pitts and Manin had in their possession goods moving in interstate commerce, which had been stolen from an interstate freight depot. The third count alleged that Elgisser and Gladstein had in their possession the same goods described in the second count.

The Record

The record in this case consists of the original typewritten record of proceedings in the District Court and printed appendices filed in the Court of Appeals. As to petitioner Elgisser, he was permitted by the Court of Appeals to proceed upon the original typewritten record of the District Court and a typewritten brief, without filing a separate appendix.

The record of the case has already been filed in this Court under date of July 29, 1964, in connection with a petition for a writ of certiorari filed on behalf of defendant Louis Gladstein, and this case bears Docket No. 332, October Term, 1964, under the caption, *Gladstein* v. *United States.*

The Pre-trial Suppression Motion

Petitioner Elgisser moved in advance of trial for an order suppressing the evidence seized at the time of his arrest on December 11, 1961, "on the ground that the said evidence was seized contrary to law, and in violation of the rights of the said defendant, under the Fourth and Fifth Amendments of the United States Constitution." Apparently said motion was based upon the provisions of Rule

41(e) Federal Rules of Criminal Procedure, although not specifically set forth in the notice of motion. A hearing on this motion was held before Honorable Thomas F. Murphy, United States District Judge, the trial judge, on the day before the trial before the jury was held. At the conclusion of the hearing, Judge Murphy denied the motion to suppress (T.R. 735B).

In his argument before the Court of Appeals petitioner Elgisser limited his factual statement to the facts adduced at the hearing held on the pre-trial suppression motion, and not to the facts in issue at the trial of the indictment. It was his position that his arrest by the arresting agents of the Federal Bureau of Investigation was made without the requisite showing of probable cause required by the provisions of Title 18, United States Code, § 3052, and the Fourth Amendment to the Constitution, and as such was illegal. Accordingly he contended that the seized evidence should have been suppressed in accordance with his motion, and should not have been received in evidence.

The Facts Adduced at the Hearing

On December 10, 1961, defendants Pitts and Manin were in Albany, New York, where they entered a freight terminal and stole a load of cartons containing rubber boots, phonograph records and some clothing. All of these goods were concededly moving in interstate commerce at that time. These they loaded into a truck furnished to them by defendant Gladstein, and then they drove back to New York City. The next day at about 5:00 p.m. defendant Gladstein was observed by agents of the Federal Bureau of Investigation to be at this truck, which was parked at Cruger Avenue and

Boston Post Road in the Bronx, New York (T.R. 672). Elgisser entered the truck and at about 5:35 p.m., the truck was driven by Gladstein to Mace Avenue and Boston Post Road, a block away, where several agents stopped it and arrested both Gladstein and Elgisser. The foregoing is set forth as the factual setting for the facts brought out at the hearing of the suppression motion which follows.

The transcript of the suppression hearing is part of the record of this case, covering pages T.R. 666-735C. There were three witnesses, all FBI agents, James S. Beardsley (T.R. 668-703), Griffin P. Martin (T.R. 704-716), and Robert J. Martin (T.R. 718-735).

Agent Beardsley testified that on December 11, 1961, at about 5:45 p.m. at Mace Avenue and Boston Post Road, Elgisser was arrested. There were two other agents there with him, Agents Scannell and Miller (T.R. 672, 675), and they were questioning Elgisser. There was no arrest warrant for Elgisser or for any one else's arrest (T.R. 675), and no search warrant. As to the precise time of Elgisser's arrest, Agent Miller testified that when he and Agent Scannell stopped the truck being driven by Gladstein, Elgisser got out of the truck at his direction (T.R. 719), and that he was then taken into custody (T.R. 722). The direct answers to counsel's questions along this line were:

> "Q. And you had him in your custody at that time, is that correct? A. He came with us, yes, sir.
>
> Q. If he wanted to walk away you wouldn't have let him walk away, would you? A. No, sir" (T.R. 722).

Thus it is clear beyond doubt or question that Elgisser was arrested by the agents at the moment the truck was first

stopped and he stepped down from it, and at no other time. This was before the truck was searched (T.R. 686).

Thus the factual issue to be determined was whether there was probable cause to arrest Elgisser (and Gladstein) without a warrant. For this issue the following testimony was submitted for consideration.

Agent Beardsley testified that he had received information from Agent G. P. Martin as to the contents of the truck (T.R. 673). This agent was not present with Beardsley at the time the stopping of the truck and arrest occurred (T.R. 673), although he was in the vicinity. This information was given to Beardsley at about five o'clock on that same day (T.R. 674). Beardsley further testified that the first information he had about this truck was at four p.m. on that day (T.R. 676), and this information he received from his supervisor, J. L. Martin (T.R. 677). Beardsley could not recall whether the information about the type of merchandise in the truck was received by him from his supervisor, Agent J. L. Martin, or whether Agent G. P. Martin told him about it (T.R. 680). Nevertheless, upon examination by the Assistant United States Attorney as to the original source of the information upon which the arresting agents acted in this case, Agent Beardsley testified as follows:

> "A. I had been told that the New York office had contacted the Albany office of the FBI and had been informed that a burglary of a Crowe & Company trucking terminal had taken place the previous week and in which a quantity of merchandise in interstate shipment, including children's rubber boots, had been stolen." (T.R. 683).

Attempts through this witness to establish that the original source of the information was a so-called "confidential source" were not received in evidence (T.R. 681-683). It is to be noted that the inquiry as to the stolen merchandise in Albany originated from the New York office of the FBI.

Agent Griffin P. Martin testified that in the morning hours of December 11, 1961, he received information from a "confidential informant" (T.R. 707) as to what was in the truck. No attempt or effort to obtain an arrest or search warrant was thereupon made. The identity of the confidential informant was never disclosed, because this agent did not know who he was (T.R. 711), although the trial court allowed him to testify that this informant "had furnished reliable information in the past" (T.R. 709). Actually this witness testified as follows:

> "Q. Mr. Martin, you say your confidential informant gave you some information, is that correct? A. No sir; it was given to another agent.
>
> Q. It was given to another agent? A. Yes, sir.
>
> Q. So you don't know how reliable that confidential informant was, do you? A. Yes, sir, I do.
>
> Q. Were you there when the information was given to the other agent? A. No, sir.
>
> Q. Did you know who the confidential informant was who gave that information to the agent? A. No, sir" (T.R. 710-711).

The name of the agent to whom the alleged confidential informant furnished the information was never disclosed.

Agent Robert J. Miller testified in like fashion to Agent G. P. Martin that he had information "from a confidential source of very high reliability" (T.R. 729) as to the contents

of the truck. This testimony was received, in spite of its conclusory nature, over specific objection (T.R. 729). It then developed that Agent Miller's source of this information was Agent G. P. Martin (T.R. 733-734), and of course it stands no higher than its source.

Thus it appears from the hearing that the source of the information that this truck contained stolen merchandise was never revealed, its reliability was never established by the Government, and was never even known to the arresting agents. Nevertheless, Judge Murphy denied petitioner's motion to suppress the evidence found on the truck (T.R. 735A), and it was later received in evidence at the trial.

The Trial

Following the denial of petitioner Elgisser's suppression motion, a joint trial was held of defendants Elgisser, Gladstein and Manin, defendants Pitts and Cogdell having theretofore pleaded guilty. Thereupon both Pitts and Cogdell testified as witnesses for the Government. At the conclusion of the Government's case the trial judge entered a judgment of acquittal on the conspiracy count, as to all of the defendants on trial. These defendants then rested their case and the case was submitted to the jury. The jury convicted Manin on the second count and Elgisser and Gladstein on the third count.

In support of its case on the conspiracy count the Court received in evidence a great deal of testimony which could not be considered or received on the substantive counts alone. Nevertheless, this evidence was before the jury and was apparently considered by them in their deliberations on the two counts submitted for their verdict. There was limit-

ing instructions given by the trial judge, which are set forth in the opinion of the court of appeals, *infra*, pp. 7a-8a.

Only Elgisser and Gladstein appealed from the judgments of conviction entered against them.

Reasons for Granting the Writ

The writ of certiorari should be granted in this case because of the importance of the issues raised, both as to the constitutional rights of petitioner Elgisser, and in the proper administration of federal criminal law.

1. There was no proper showing of "probable cause" for petitioner's arrest without a warrant by the federal agents involved in this case. Petitioner's pre-trial motion to suppress the evidence seized at the time of his arrest should have been granted. Although the discussion of the law applicable to the facts of this case, set forth in the opinion of Circuit Judge Sterry R. Waterman of the Court of Appeals, *infra*, is correct, its application to the specific facts of this case is incorrect and seems to fly in the face of the settled law that "probable cause" to arrest without a warrant must be established by the arresting agents. Here the arresting agents wholly failed to make such showing at the hearing held on this motion.

In *Henry* v. *United States*, 361 U.S. 98, this Court spelled out the requirements for a proper showing of "reasonableness" or "probable cause" under the provisions for arrest without warrants of Title 18, United States Code, § 3052. These requirements are equivalent to the requirements (as to such "probable cause") under the Fourth Amendment for searches without warrants, *Wong Sun* v. *United States*,

371 U.S. 471. In the recent case of *Aguilar* v. *Texas*, 378 U.S. 108, this Court again restated these principles. In the *Henry* case this Court declared that "The requirement of probable cause has roots deep in our history" (p. 100). The requirement for establishing such probable cause is on the Government. This Court then wrote:

> "The prosecution conceded below, and adheres to the concession here, that the arrest took place when the federal agents stopped the car. That is our view on the facts of this particular case. When the officers interrupted the two men and restricted their liberty of movement, the arrest, for purposes of this case, was complete. It is, therefore, necessary to determine whether at or before that time they had reasonable cause to believe that a crime had been committed. The fact that afterwards contraband was discovered is not enough. An arrest is not justified by what the subsequent search discloses, as *Johnson* v. *United States, supra* (333 U.S. 10, 13-15), holds" (361 U.S. 98, 103).

In the present case the opinion of the court of appeals justifies the search of the stopped truck by what the arrest and subsequent search disclosed, see p. 15a, *infra*:

> "Thus, the correctness of the informer's tip had to some extent been confirmed through corroboration."

The only corroboration to which the court referred was the contraband found on the truck *after the truck was stopped and petitioner Eligsser had been arrested.*

As this Court observed in *Henry*, "what transpired at or after the time the car was stopped by the officers is, as we have said, irrelevant to the narrow issue before us" (361 U.S. 98, 104). A search is never made good by what

it turns up. *United States* v. *DiRe*, 332 U.S. 581, 585. *Johnson* v. *United States*, 333 U.S. 10; *Giordenello* v. *United States*, 357 U.S. 480.

It is to be noted that the judges of the court of appeals have disagreed as to the applicable law in this case, and as to the facts of the record. We wish to observe that there is a great distinction between the facts adduced at the suppression hearing as distinguished from the trial itself. The Court of Appeals opinions really refer to the trial evidence rather than the hearing evidence.

This case presents the foregoing issue as a matter of constitutional importance in the protection of individual rights. For this reason certiorari should be granted to enable this Court to consider this case on the merits.

2. It was not proper for the trial of petitioner to continue, together with the other defendants, on the substantive counts of the indictment, following the entry of a judgment of acquittal on the conspiracy count at the close of the Government's case. The holding in the case of *Schaffer* v. *United States*, 362 U.S. 511, should be re-examined by this Court.

For the purposes of this point petitioner respectfully incorporates by reference herein the argument set forth in support of the petition for a writ of certiorari in the companion case of *Gladstein* v. *United States*, No. 332, October Term, 1964. Further elaboration of this argument will not be set forth herein, except that petitioner Elgisser believes that the decision of *Schaffer* v. *United States*, 362 U.S. 511, should be re-examined and re-considered by this Court.

The attention of the Court is respectfully invited to the pending case of *Fernandez* v. *United States,* No. 219, October Term, 1964, wherein the Court is also being requested to reconsider the *Schaffer* case.

CONCLUSION

For all of the foregoing reasons, this petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

DANIEL H. GREENBERG
Counsel for Petitioner

August 21, 1964.

APPENDIX

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 313—September Term, 1963.
(Argued February 11, 1964 . Decided July 7, 1964.)
Docket No. 28566

UNITED STATES OF AMERICA,

Appellee,

—v.—

MAX MANNY ELGISSER and LOUIS GLADSTEIN,

Appellants.

Before:

LUMBARD, *Chief Judge,*
WATERMAN and FRIENDLY, *Circuit Judges.*

Appellants seek reversal of their convictions, United States District Court for the Southern District of New York, Murphy, *J.* with jury, for having violated 18 U. S. C. §659. Convictions affirmed.

ROBERT M. MORGENTHAU, United States Attorney, Southern District of New York (Peter Fleming, Jr., Charles A. Stillman, Asst. United States Attorneys, of counsel), *for Appellee.*

DANIEL H. GREENBERG, New York City, *for appellant Elgisser*

BOBICK & DEUTSCH (Arthur Addess, of counsel), New York City, *for appellant Gladstein.*

Appendix—Opinion of the United States Court of Appeals

WATERMAN, *Circuit Judge*:

In the first count of an indictment Louis Gladstein and Max Manny Elgisser, along with William James Pitts, James Offie Cogdell, and Edward James Manin, were charged with having conspired, on and after December 1, 1961, to violate Title 18, Section 659 of the United States Code. That section makes it a crime either to steal from an interstate facility goods moving in interstate or foreign commerce, or to receive or possess such goods knowing them to be stolen.[1] A second count charged Pitts and Manin with the substantive offense of knowingly possessing such goods on December 10, 1961; and a third count charged Elgisser and Gladstein with having committed the substantive offense of knowingly possessing such goods on December 11, 1961. Pitts and Cogdell pleaded guilty before they were brought to trial, and both testified for the Government at the joint trial of Gladstein, Elgisser, and Manin, held in

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[1] The statute provides in pertinent part:

> Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any railroad car, wagon, motortruck, or other vehicle, or from any station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express; or
>
> Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen; . . .
>
> * * * * *
>
> Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.
>
> * * * * *

the United States District Court for the Southern District of New York before Judge Thomas F. Murphy and a jury. At the close of the Government's evidence the conspiracy count was dismissed as to all of the defendants, and, none of the defendants desiring to offer further proof, the case then went to the jury on the two substantive counts that alleged knowing possession of stolen goods. The jury found defendant Manin guilty on the second count of the indictment and defendants Gladstein and Elgisser guilty on the third count. The judgments of conviction were entered accordingly.

Defendants Gladstein and Elgisser have appealed from their convictions. Defendant Gladstein claims (1) that the trial court erred in failing to give a charge which properly instructed the jury as to the limited use which could be made of certain evidence, out-of-court statements by the various defendants, which had been admitted subject to connection under the conspiracy count without limitation as to purpose; and (2) that there was insufficient evidence to support his conviction. Defendant Elgisser joins defendant Gladstein in the latter's first claim of error, and he argues further that the court erred in admitting real evidence which had allegedly been seized illegally by the federal agents who arrested him and Gladstein. We find all three claims of error to be without merit and accordingly affirm both convictions.

The Government's evidence consisted largely of the testimony of Pitts and Cogdeli and established the following: On Wednesday, December 6, 1961, Manin approached Pitts in a New York gas station where Pitts worked, spoke to him about some dresses which Manin had in his possession, and

Pitts offered to try to sell them for Manin. Later that day Pitts contacted Cogdell, who informed Pitts that he would take him to a man that evening who would buy all the dresses Pitts could get. That night the trio met defendant Elgisser and Elgisser purchased twenty dresses from Manin. Either Manin or Pitts also told Elgisser that they could obtain a "load of dresses" but would have difficulty in securing a truck to transport them. Elgisser indicated that he could help them obtain the needed vehicle.

The following day, Thursday, Manin, Cogdell and Pitts drove to a butcher shop owned by Elgisser; and, after Cogdell had talked to Elgisser and had secured the necessary directions, the three drove on to defendant Gladstein's wrecking lot on Boston Post Road in the Bronx. All three went inside, and Cogdell asked to see the owner of the lot. Gladstein then appeared and asked Cogdell, "Are you the fellow?" Cogdell replied in the affirmative, and Gladstein, having just picked up a telephone which had begun to ring, said into it, "Yes, they're here now." Gladstein and his visitors then left the office of the wrecking lot and got into a car which was sitting outside. Gladstein asked about "the load of dresses" which Elgisser had told him about, indicated that he was upset by the fact that Elgisser was involved with the matter, and said that "being as you know him already, there's already been a deal, let it go at that." After discussing with the three their need for a truck, Gladstein showed them a Reo truck with a red cab and blue body which he said he could have ready for them by six o'clock the next evening. Pursuant to this arrangement, the following evening, Friday, December 8, Manin, Pitts and Cogdell returned to Gladstein's wrecking lot for the

truck. Gladstein said that the truck ran well, he provided license plates for it, admonished the three to "be careful," and furnished Cogdell with a telephone number to call when the truck was returned to New York. Pitts, Cogdell and Manin then left the wrecking lot in the truck and later that evening Pitts and Manin drove it to Albany.

In Albany, Pitts and Manin failed to make contact with the party from whom they were to obtain the dresses, and they decided to stay in that city overnight. The following evening, Saturday, December 9, Pitts and Manin entered an Albany freight terminal owned by Crowe and Company, Inc., an interstate trucking firm, and took away various cartons containing children's rubber boots, phonograph records and clothing. The two then returned to New York with the load of cartons, arriving back in the city on Sunday morning, December 10. They phoned Cogdell to tell him that they had returned and then met him at the gas station where Pitts worked. Cogdell then called the telephone number which Gladstein had given him; and, pursuant to instructions which he thereupon received from a "Mike" on the other end of the line he, assisted by Pitts and Manin, took the loaded truck to a truck stop at Baychester Avenue and Boston Post Road in the Bronx and left it there.

On Monday, December 11, at about 4:00 P.M., Cogdell stopped at Gladstein's wrecking lot and asked for Gladstein. Gladstein appeared and told him, "California's [Manin's] been here and collected the money, I gave him $500 and—I gave him $500—well, that's the best I could do." Later that day, between about 5:00 and 5:30 P.M., under circumstances to be described in detail later in this opinion, FBI agents who had been keeping the Reo truck under surveillance ar-

rested Gladstein and Elgisser in the Bronx. Immediately prior to the arrests, Elgisser had been in the body of the truck and Gladstein had been driving it. A search of the truck revealed that it contained miscellaneous goods, including some of the cartons of rubber boots and two of the cartons of phonograph records which had been stolen from the Crowe and Company Albany terminal. Gladstein, at the time of arrest, told the agents that the truck had been left with him to sell and that he was moving it off the street to an unidentified lot farther up the road. When directed by the agents to drive the truck to his own lot, which, interestingly enough, was only one hundred feet away, Gladstein did so and had no difficulty parking the truck there. Gladstein consented shortly thereafter to a search by FBI agents of a Bronx store owned by him. The searchers there found additional cartons of rubber boots, one carton of photongraph records, and one carton of clothes, all of which had been part of the load stolen from the Crowe and Company terminal.

At the close of the Government's case Judge Murphy dismissed the conspiracy count of the indictment for failure of proof. If the Government had succeeded in establishing the existence of the alleged conspiracy, the jury would have been permitted to consider, under the established exception to the hearsay rule that makes admissible against every member of a conspiracy the declarations of any one conspirator which have been made in furtherance of the conspiracy, unsworn out-of-court statements made by any of the defendants as evidence against every one of them. *Krulewich* v. *United States*, 336 U. S. 440, 69 S. Ct. 716 (1949); *United States* v. *Mishkin*, 317 F. 2d 634 (2 Cir.), *cert. de-*

nied, 375 U. S. 827, 84 S. Ct. 71 (1963); *United States* v. *Lev*, 276 F. 2d 605 (2 Cir.), *cert. denied*, 363 U. S. 812, 80 S. Ct. 1248 (1960). However, a failure to establish the existence of a conspiracy would render inadmissible for this broad purpose the out-of-court declarations which, subject to the Government's establishing the alleged conspiracy, had already been permitted to come into evidence against the defendants generally. On the other hand, there being no indication of bad faith on the part of the Government in bringing the conspiracy count, or of special circumstances requiring a different procedure, the defendants have no valid objection if the use of the evidence introduced against them subject to proof of a conspiracy were properly so limited. *United States* v. *Manfredi*, 275 F. 2d 588 (2 Cir.), *cert. denied*, 363 U. S. 828, 80 S. Ct. 1598 (1960); *United States* v. *Schaffer*, 266 F. 2d 435 (2 Cir. 1959), *aff'd*, 362 U. S. 511, 80 S. Ct. 945 (1960). This was done here and the limiting instructions which Judge Murphy gave to the jury adequately protected these defendants.

After the close of the Government's case and the dismissal of the conspiracy count, and before the summations and the charge to the jury, Judge Murphy informed the jury that the conspiracy count had been dismissed and instructed the jurors to "confine your thinking to the evidence that was received that related to a specific defendant as distinguished from some conversations that were had in his absence." During his charge Judge Murphy devoted considerable attention to the matter of the limited use to which the jury could put the codefendant declarations:

> Secondly, there was considerable testimony which I permitted in evidence on the representation that the government was going to connect it later on. This re-

lated generally to the conspiracy count, which is no longer in the case, and to a large extent related to conversations that Mr. Pitts had with Manin, sometimes called California, and conversations with Mr. Cogdell and also related to conversations that Cogdell had with Pitts and Manin.

If the government had proved the conspiracy, according to the way I understand the law, the conversations by conspirators could be admissible against all conspirators even though they were not present. But since I have dismissed the conspiracy you must disregard that testimony and consider only the testimony that relates to specific defendants and only those conversations had with a specific defendant and in that defendant's presence. Now, this does not exclude any conversations that Mr. Pitts or Mr. Cogdell made with the defendant Elgisser as long as you remember that it can be considered by you only with regard to the defendant Elgisser and not relating to Gladstein. It also does not exclude any conversations Pitts or Cogdell had with the defendant Gladstein, but you must consider that such conversations are to be considered by you only with regard to Gladstein and not with regard to Elgisser.

These interim instructions, and the charge of the trial court adequately apprised the jury that it was not to consider the unsworn out-of-court statements of any one defendant as evidence against any other defendant.[2] See

[2] Though defense counsel objected to the charge it should be noted that counsel gave the court no written requests to charge despite a specific invitation by the trial judge to do so.

United States v. *Manfredi, supra,* at 593-94; *United States* v. *Schaffer, supra,* at 443; *United States* v. *DeFillo,* 257 F. 2d 835, 839 (2 Cir. 1958), *cert. denied,* 359 U. S. 915, 79 S. Ct. 591 (1959); *United States* v. *Herskovitz,* 209 F. 2d 881, 885-86 (2 Cir. 1954). In fact, the instructions and charge may well be viewed as having gone beyond this, for, literally read, they even barred as evidence against the defendants all statements by Pitts and Cogdell which were made out of the defendants' presence. Of course, since Pitts and Cogdell testified in court as to their own prior declarations the hearsay rule could not possibly have operated to render these statements inadmissible in any way; and, as long as the requirements of relevancy and materiality were met, the statements were admissible against any of the defendants. See *United States* v. *Mishkin, supra,* at 637.

Contrary to defendant Gladstein's second claim of error, there was sufficient evidence to establish that his possession of the stolen goods had been with the requisite knowledge that they had been stolen. Two days after the goods had been stolen Gladstein was apprehended driving his own truck, the one which had been used in the theft, which contained most of the stolen goods. The rest of the goods were found, shortly after Gladstein was taken into custody, in a store owned by him. At trial Gladstein offered no explanation for his possession. This in itself was sufficient to entitle a jury to draw the permissible inference that Gladstein had possessed the goods knowing them to have been stolen. *United States* v. *Minieri,* 303 F. 2d 550 (2 Cir.), *cert. denied,* 371 U. S. 847, 83 S. Ct. 79 (1962); *United States* v. *Lefkowitz,* 284 F. 2d 310 (2 Cir. 1960). Moreover,

there was considerable evidence other than unexplained possession by Gladstein tending to establish guilty knowledge on his part. Gladstein's statements to Cogdell and Pitts, made when arrangements were being worked out for the use of Gladstein's truck, tended to establish that Gladstein realized that the vehicle was going to return with stolen goods, as did the warning to "be careful" which he issued when he turned the truck over to them the following day. Finally, the use of the telephone number given Cogdell by Gladstein to receive instructions as to where to park the truck loaded with the stolen goods, as well as Gladstein's statement to Cogdell that he had paid Manin $500 and "that's the best I could do," constituted additional evidence on this issue damaging to Gladstein.

We come now to defendant Elgisser's claim that evidence seized at the time of his arrest without a warrant, consisting of the stolen goods then in his and Gladstein's possession, should have been suppressed and not permitted to be introduced against him at trial. The testimony adduced at the hearing on the motion to suppress established the following: On the morning of Monday, December 11, 1961, the New York office of the Federal Bureau of Investigation received information from a confidential informant who, according to agents of that office, had furnished reliable information in the past, that a Reo truck with a red cab and a blue body containing rubber boots and phonograph records which had been stolen in upstate New York, was parked in the vicinity of the Boston Post Road in the Bronx. Agent Griffin P. Martin thereafter caused the upstate FBI office in Albany to be contacted and learned from

that office that, over the previous weekend, the Crowe and Company trucking terminal in Albany had been burglarized. The burglars were reported to have stolen cartons of children's rubber boots that were in interstate commerce. An attempt was then made to locate the Reo truck, and at 1:00 P.M. that day the truck was located on Cruger Avenue, just off the Boston Post Road, in the Bronx. The truck was put under surveillance by agent Martin, who was relieved later that day by agents Beardsley, Brown, Scannell and Miller.

Agents Beardsley and Miller testified that at the time they relieved agent Martin they had been advised that the truck contained a quantity of merchandise, including cartons of children's rubber boots, which had been stolen the previous weekend from upstate New York, and that the Albany FBI office had verified a theft of interstate merchandise of that type from an upstate New York terminal the past weekend. Agent Miller testified that he had been told by agent Martin that the information as to the truck's contents had come from a confidential informer of high reliability. Agent Martin testified that he did not know who the informer was, but nevertheless maintained that he knew that the informer was reliable. The four agents relieving agent Martin split up into two surveillant teams, with agents Miller and Scannell taking up a position in a parked car some distance behind the truck on Cruger Avenue, and with agents Brown and Beardsley maintaining a mobile surveillance of the truck from another car.

At about 5:20 P.M. agents Brown and Beardsley observed a man dressed in a white smock, who they later determined was defendant Elgisser, open the body of the

truck and get in. They radioed this information to agents Miller and Scannell, who approached the truck in their car. Agent Miller got out of his car and went over to the truck, knocked on the door to its body, and called out "FBI." Elgisser open the truck door and at once agent Miller was able to observe that Elgisser was holding in one hand a pair of children's rubber boots and in the other a flashlight. He also observed children's rubber boots on the floor at Elgisser's feet, and he could also see, farther back in the body of the truck, other cartons, one of which had children's rubber boots sticking out of it.

Agents Miller and Scannell then took Elgisser into custody, and by radio informed agents Brown and Beardsley of the arrest and of what agent Miller had observed in the truck. A few minutes later the truck pulled out. Agents Brown and Beardsley followed it for about a block, waved it over to the curb, and arrested the driver, defendant Gladstein. The body of the truck was opened and a quick search revealed that it contained children's rubber boots. These were seized and later introduced in evidence against the defendants, along with phonograph records also found in the truck. These were shown to be part of the loot stolen in the upstate burglary.

The admissibility of the evidence which was seized depends, of course, upon the legality of the search which was made of the truck, and this in turn depends upon whether the arrests, made without warrants, were legal. Agents of the FBI have statutory authority to make felony arrests without a warrant for offenses "committed in their presence," or where they have "reasonable grounds to believe that the person to be arrested has committed or is commit-

ting" a felony. 18 U. S. C. §3052. The "reasonable grounds" requirement of the statute is equivalent to the Fourth Amendment's requirement that arrests may be made only upon "probable cause." *Wong Sun* v. *United States*, 371 U. S. 471, 478, fn. 6, 83 S. Ct. 407, 412 (1963): *Henry* v. *United States*, 361 U. S. 98, 100, 80 S. Ct. 168, 170 (1959). What constitutes "reasonableness" or "probable cause" must depend upon the specific facts of each case, *United States* v. *Williams*, —— F. 2d —— (2 Cir. May 15, 1964), (*per curiam*); *United States* v. *Wai Lau*, 329 F. 2d 310 (2 Cir. 1964) *(per curiam)*, but it is clear that in every case the Government has the burden of establishing that the probable cause requirement has been met. *Wong Sun* v. *United States, supra; Carroll* v. *United States*, 267 U. S. 132, 45 S. Ct. 280 (1925); *United States* v. *Rivera*, 321 F. 2d 704 (2 Cir. 1963). We think that the totality of the circumstances in this case warranted the court below in finding that the Government had sustained its burden, and had established that information available to the arresting agents at the time of the arrests was such as to "warrant a man of reasonable caution in the belief" that a felony had been and was being committed. *Carroll* v. *United States, supra*, at 162, 45 S. Ct. at 288.

At the time agents Miller and Scannell arrested Elgisser, they had been advised that a "reliable" confidential informant had told the FBI that the Reo truck, a Reo truck with a red cab and a blue body, they had been assigned to watch contained goods which had been stolen in upstate New York. If this had been the only information available to the arresting agents at the time of arrest we would be reluctant to find that the Government had met its burden of

establishing that this arrest was lawful. Only information from a reliable informer will suffice to establish probable cause, see *Draper* v. *United States*, 358 U. S. 387, 79 S. Ct. 329 (1959), and for this reason an accusation by an informer cannot itself furnish probable cause where arresting agents have "no basis in experience for confidence in the reliability" of the informer's information. *Wong Sun* v. *United States, supra*, at 480, 83 S. Ct. 407, 413. Moreover, where information received from an informer is essential to the establishment of probable cause, his name may not be withheld from the judge or magistrate whose duty it is to determine whether the probable cause requirement has been met. *United States* v. *Santiago*, 327 F. 2d 573 (2 Cir. 1964); *United States* v. *Robinson*, 325 F. 2d 391 (2 Cir. 1963). As we said in the *Robinson* case, decisions as to the reliability of informers who have been furnished information used to make an arrest "should not be left in the hands of law enforcement officers who may later be called upon to justify their action; they may safely be left only in the hands of some impartial judge or magistrate." 325 F. 2d at 391.

In this case the only evidence on the issue of the previous reliability of the informer was the opinion of FBI agents that the informer was reliable. Agent Martin, who, it appears from the record, was the testifying agent who knew the most about the informant, stated that he believed the informant to be reliable but admitted that he did not know who the informer was. It would seem that if the burden of establishing probable cause is in truth to be placed on the Government in these cases, and if the existence or absence of probable cause is in fact to be determined by an impar-

tial judge or magistrate, then, where the existence of probable cause depends solely upon the reliability of an informer, the Government must be required to do more than establish that, in the opinion of the agents directing or participating in the arrest, the informer was reliable, or that in the agents' opinion information furnished by the informer in the past had been found to be reliable, whatever that may mean to them. The Government, in order to carry its burden of proof on the issue of probable cause, at least ought to be required to name the informer and to indicate what information the informer has furnished in the past, and with what results. Otherwise, the finding of the existence or absence of probable cause in a case where the reliability of the informer is at issue will not depend upon the considered judgment of an impartial judge or magistrate, but upon the judgment of law enforcement officers involved in the arrest.

Here, however, the arresting agents, at the time of arrest, had before them more than a tip that the truck on which they had been directed to keep a watch contained stolen goods. The Albany office of the FBI had told the New York office that an upstate terminal had been burglarized and that goods of the type reported by the informer to be in the truck had been stolen. Thus, the correctness of the informer's tip had to some extent been confirmed through corroboration. See *United States* v. *Boston*, 330 F. 2d 937 (2 Cir. 1964); *United States* v. *Wai Lau, supra; United States* v. *Rivera, supra; United States* v. *Nicholas*, 319 F. 2d 697 (2 Cir. 1963); *United States* v. *Williams*, 219 F. Supp. 666 (S. D. N. Y. 1963), *aff'd per curiam*, —— F. 2d —— (2 Cir. May 15, 1964). Moreover, as Elgisser

opened the rear door of the truck in response to Miller's knock, Miller observed, immediately before Elgisser was arrested, that the truck contained children's rubber boots, goods of the type which Miller had been informed had been stolen the previous weekend in the upstate New York burglary. Under all the circumstances, we think that the arrest of Elgisser, and the arrest of Gladstein a few minutes later, were both made upon probable cause.

The judgments of conviction appealed from are affirmed.

LUMBARD, Chief Judge (concurring):

I concur in affirming the judgments of conviction. However, as I believe that much of what Judge Waterman has written regarding probable cause is unnecessary to the facts of this case, I think it advisable to emphasize that here the FBI agents had probable cause to make the arrests on the basis of information in possession of the FBI and what they themselves knew and saw. This information and knowledge was quite apart from the reliability or unreliability of the person who informed them on the morning of December 11, 1961 that a Reo truck with a red cab and blue body parked in the vicinity of the Boston Post Road in the Bronx contained rubber boots and phonograph records which had just been stolen in Albany.

As Judge Waterman points out, the check which the agents then made and their own observations when the back of the truck was opened voluntarily in response to their knocking, taken together with the Bureau's confirmation of the fact that rubber boots and phonograph records had in

fact been stolen the day before from a freight terminal owned by Crowe and Company, Inc., an interstate trucking firm, in Albany, were sufficient to give the agents probable cause to believe that a crime had been committed and that Elgisser and Gladstein were then and there in the act of committing the crime of which they stand convicted. Therefore, cases such as *United States* v. *Robinson*, 325 F. 2d 391 (2 Cir. 1963) where the arresting officers knew nothing more than what the informant had told them, are not in point and need not be discussed.

FRIENDLY, *Circuit Judge*, concurring):

I concur in both opinions.

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Nos. 332 and 430

In the Supreme Court of the United States

OCTOBER TERM, 1964

LOUIS GLADSTEIN, PETITIONER

v.

UNITED STATES OF AMERICA

MAX MANNY ELGISSER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

	Page
Opinion below	1
Jurisdiction	2
Questions presented	2
Statutes and rule involved	2
Statement	4
Argument	9
Conclusion	13

CITATIONS

Cases:

Brinegar v. *United States*, 338 U.S. 160	10
Clark v. *United States*, 213 F.2d 63	11
Draper v. *United States*, 358 U.S. 307	9
Dykes v. *United States*, 313 F.2d 580, certiorari denied, 374 U.S. 837	11
Fernandez v. *United States*, 329 F.2d 899	10
Kotteakos v. *United States*, 328 U.S. 750	12
Opper v. *United States*, 348 U.S. 84	11
Pereira v. *United States*, 347 U.S. 1	11
Schaffer v. *United States*, 362 U.S. 511	10
United States v. *Berling*, 324 F.2d 249, certiorari denied, 376 U.S. 955	12
United States v. *Kaufman*, 311 F.2d 695	10-11
United States v. *Manfredi*, 275 F.2d 588, certiorari denied, 363 U.S. 828	11
United States v. *O'Brien*, 319 F.2d 437	10
United States v. *Olweiss*, 138 F.2d 798, certiorari denied, 321 U.S. 744	13
United States v. *Rabin*, 316 F.2d 561, certiorari denied, 375 U.S. 815	10
United States v. *Sapperstein*, 312 F.2d 694	13

Statutes and Rules:

18 U.S.C. 371	4
18 U.S.C. 659	2, 4
18 U.S.C. 3052	3

Statutes—Continued

Page

Federal Rules of Criminal Procedure:

Rule 8 ..... 3, 11
Rule 14 ..... 4, 11

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 332

LOUIS GLADSTEIN, PETITIONER

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UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 334 F.2d 103.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 1964. Gladstein's petition for a writ of certiorari (No. 332) was filed on July 29, 1964. Elgisser's petition for a rehearing was denied by the court of appeals on July 27, 1964. His petition for a writ of certiorari (No. 430) was filed on August 25, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the officers arresting petitioner Elgisser had reasonable grounds to believe that he was in the possession of merchandise stolen from interstate freight.

2. Whether the trial court properly submitted to the jury the substantive charge of possessing goods stolen from interstate freight after dismissal of a conspiracy charge.

STATUTES AND RULES INVOLVED

18 U.S.C. 659 provides, in pertinent part:

> Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any railroad car, wagon, motortruck, or other vehicle, or from any station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or

which are a part of or which constitute an interstate or freight shipment of freight or express; or

Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen; * * *

Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

* * * *

18 U.S.C. 3052 provides as follows:

The Director, Associate Director, Assistant to the Director, Assistant Directors, inspectors, and agents of the Federal Bureau of Investigation of the Department of Justice may carry firearms, serve warrants and subpoenas issued under the authority of the United States and make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony.

Rule 8, F.R. Crim. P., provides as follows:

(a) *Joinder of Offenses.* Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions

connected together or constituting parts of a common scheme or plan.

(b) *Joinder of Defendants.* Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Rule 14, F.R. Crim. P., provides:

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

STATEMENT

Petitioners and three co-defendants were indicted in the United States District Court for the Southern District of New York for conspiracy to steal from interstate freight and for the substantive offense of possessing merchandise thus stolen, in violation of 18 U.S.C. 371, 659. Co-defendants Pitts and Cogdell pleaded guilty and testified for the government in the joint trial of petitioners and defendant Manin. Following the court's dismissal of the conspiracy count at the conclusion of all the testimony, the jury found defendants guilty on the charges of possession. Petitioners Gladstein and Elgisser were sentenced to im-

prisonment for three years and two years, respectively (R. 792-793). The court of appeals affirmed. *United States* v. *Elgisser*, 334 F.2d 103.

1. Both petitioners moved to suppress as evidence the merchandise allegedly stolen from interstate commerce which was seized incident to their arrest. Only Elgisser (No. 430) presses the point in this Court. On the hearing of their motion to suppress, it was shown that on the morning of December 11, 1961, information was received by the office of the Federal Bureau of Investigation in New York City from a confidential informant who had furnished reliable information in the past that a Reo truck with a red cab and a blue body parked in the vicinity of the Boston Post Road in the Bronx contained rubber boots and phonograph records that had been stolen from upstate New York (H. Tr. 40-42).[1] Agent Griffin P. Martin, who so testified, stated that he himself did not know who the informant was (H. Tr. 44). Martin caused inquiry to be made of the Albany office, which advised that the Crowe and Co. truck terminal had been burglarized over the weekend and that cartons of rubber boots moving in interstate commerce had been stolen (H. Tr. 42).

A truck answering the foregoing description was located shortly thereafter on Cruger Avenue just off the Boston Post Road in the Bronx. Martin kept the truck under observation from about 1:00 p.m. until

[1] "H. Tr." refers to the transcript of the hearing of petitioners' motion to suppress. "Tr." refers to the trial transcript.

about 4:00 p.m. He was then relieved by four other agents, to whom he conveyed the information which he had already received (H. Tr. 40-43, 7, 9-10, 14, 16-17, 61-62, 66). Shortly after 5:00 p.m., agents parked some distance to the rear of the truck saw petitioner Elgisser get into the body of the truck (H. Tr. 6, 50). One of the agents knocked and called, "F. B. I." Elgisser opened the door. In one hand he was holding a pair of children's rubber boots and in the other a flash light. No search was then made of the truck, but the agents saw through the open door that there was an open carton containing children's rubber boots and a number of unopened cartons (H. Tr. 51-53, 63). The agents did not then inform Elgisser that he was under arrest but in effect arrested him by requiring him to enter their car, which was driven to the next block and turned around for further observation of the truck (H. Tr. 54). The agents who were conducting a moving surveillance of the truck in the other car were notified by radio of the observation of the boots and the fact that Elgisser was in custody (H. Tr. 64, 19).

A few minutes later, the truck pulled away from its parking spot (H. Tr. 19, 54). The agents in the moving car pulled abreast and stopped the truck. The driver, petitioner Gladstein, said that the truck did not belong to him, but had been left with him several weeks earlier for sale and that he was taking it to find a place to park in some service station. So far as he knew, the truck was empty and he said he had no objection to the agents looking in. The agents opened the door and saw the cartons and a

number of loose children's boots on the floor. Gladstein said that he had not seen the merchandise before (H. Tr. 19-20, 33-34). On these facts, the court denied the motion to suppress (H. Tr. 68).

2. At the trial, events over a five-day period beginning Wednesday, December 6, 1961, were described. Defendant Pitts testified for the government that on this date he had a conversation with defendant Manin in New York City relating to the sale of stolen dresses (Tr. 27) in which defendant Cogdell, who also testified for the government, participated. Cogdell spoke to petitioner Elgisser, who said that he would take anything they could get (Tr. 38-40, 231-232). Elgisser bought twenty of the stolen dresses and asked how many more Cogdell could get. When Cogdell said that he needed a truck, Elgisser replied that that was no problem (Tr. 42-47). Manin said that "Johnny" in Albany was supposed to have a truckload of dresses. Elgisser responded that he did not care where they came from (Tr. 47-48).

Elgisser then directed the three men to a junkyard in the Bronx, where they met petitioner Gladstein. Gladstein said that he did not trust Elgisser and that, in the future, they should deal with him directly. Gladstein said that he could buy or use merchandise like the dresses. He showed them a Reo truck with a red cab and a blue body, which he said would be ready to go the next afternoon. He provided them with a set of license plates, gave them a number to call when they returned and warned them to be careful (Tr. 50-58, 242-247).

On Friday evening, Pitts and Manin drove the truck to Albany. They met "Johnny", but were unable to obtain anything from him. On Saturday night they found a door open at Crowe and Co., a trucking concern, and loaded their truck with cartons they found there which contained rubber boots, phonograph records and clothing (Tr. 58-67, 270). Upon their return to New York City Sunday morning, they notified Cogdell. He called the number given by Gladstein and was directed to take the truck to an address in the Bronx (Tr. 70-71, 248).

On Monday, Cogdell tried to collect from Gladstein, who turned him down, saying that he had given $500 to Manin and that was all that he could pay (Tr. 249). On Monday afternoon, the truck was located by F. B. I. agents near Gladstein's junkyard, followed by the arrest of both petitioners as already described (*supra*, pp. 6-7). Elgisser made a statement to the F. B. I. agents which incriminated Gladstein, but did not sign it (Tr. 357-359, 408, 419, 425). Following Gladstein's arrest in the Reo truck, which he said he was taking to find a parking lot, it was driven to the junkyard, where there was ample space for it. It contained a number of cartons of children's rubber boots, phonograph records and other items (Tr. 373-377). Gladstein then took the agents to a store which he operated, where a number of similar cartons were found containing the same kind of articles (Tr. 378). The cartons on the truck and in the store were identified as missing from Crowe and Co. in Albany (Tr. 270, 284, 362-365, 376, 379, 400-406).

At the conclusion of the government's evidence, petitioners moved for acquittal on both the conspiracy and the substantive charges. The court sustained the motion as to the conspiracy count but denied it as to the substantive counts. The court also refused to grant a mistrial because of dismissal of the conspiracy count, saying that it would instruct the jury, limiting consideration of the evidence received on this charge (Tr. 464-468). No evidence was introduced by petitioners.

ARGUMENT

1. There was ample basis for crediting the information received from an unidentified confidential informant that a Reo truck having a red cab and blue body was parked in a described locality and contained items stolen in upstate New York. A call to the Albany F. B. I. office corroborated the accuracy of the report and furnished further information as to the time and place of the theft, and the fact that the articles were moving in interstate commerce. Additional substantiation was given when a truck of this rather unusual description was spotted in the area described. Cf. *Draper* v. *United States*, 358 U.S. 307, 311-313.

After petitioner Elgisser was seen to enter the body of the truck, agents approached the truck and called, "F.B.I.". Elgisser responded by opening the door. He was holding a pair of children's rubber boots at the time and additional boots could be seen within. Without any search whatever, there were then reasona-

ble grounds to believe that Elgisser was in possession of some of the stolen articles. The contents of the truck could then properly have been seized, but were not touched until Gladstein had implicated himself by driving the truck away from its parking place. Incidental to his arrest and with his permission, the truck was searched without, however, revealing substantially more than had already been apparent when Elgisser had appeared at the open door of the truck.

In view of the abundant substantiation furnished before the arrest, it is unnecessary to consider the independent sufficiency of the information obtained from the confidential informant whose name was not disclosed and whose reliability was not fully explained. The arresting officers did not act on the information alone, but waited until it had been substantially corroborated. Adding facts uncovered by the officers to the reasonably trustworthy information they had been given, they were clearly warranted in believing that an offense was being committed in their presence. *Brinegar* v. *United States*, 338 U.S. 160, 175-176.

2. The court properly denied the motion for mistrial based upon dismissal of the conspiracy charge. There is no hard-and fast rule that when a conspiracy count fails, joinder is error as a matter of law. *Schaffer* v. *United States*, 362 U.S. 511, 516. See, also, *Fernandez* v. *United States*, 329 F.2d 899, 905 (C.A. 9); *United States* v. *O'Brien*, 319 F.2d 437, 439 (C.A. 7); *United States* v. *Rabin*, 316 F.2d 564, 568 (C.A. 7), certiorari denied, 375 U.S. 815; *United*

States v. *Kaufman*, 311 F.2d 695, 698 (C.A. 2); *Dykes* v. *United States*, 313 F.2d 580, 581 (C.A. D.C.), certiorari denied, 374 U.S. 837. The transactions here involved plainly constituted part of a common scheme or plan within Rule 8, F. R. Crim. P. Whether a severance should be granted rests within the sound discretion of the trial court. Rule 14, F. R. Crim. P.; *Opper* v. *United States*, 348 U.S. 84, 95.

There is no merit to petitioners' contention that the joinder of conspiracy with substantive charges was made in bad faith. *United States* v. *Manfredi*, 275 F.2d 588, 593 (C.A. 2), certiorari denied, 363 U.S. 828. The evidence supports the view that Elgisser authorized the men making the trip to bring back whatever might be available, regardless of source. The rather ambiguous language of Gladstein would also seem to grant a similar broad commission (*supra*, p. 7). The situation here is comparable to that in which the implied understanding was that whiskey be stolen from any source which might prove convenient or accessible, where the court held that this would include an interstate shipment and thus support a federal charge. *Clark* v. *United States*, 213 F.2d 63, 64-65 (C.A. 5). Compare also *Pereira* v. *United States*, 347 U.S. 1, 11-12, 14. There is no adequate basis for disregarding the finding of the courts below that joinder was in good faith.

Following the dismissal of the conspiracy charge, the court gave clear and comprehensive instructions limiting the jury in their consideration of testimony as to various conversations, to which no objections

were made.[2] Only three defendants were tried together, so the danger of transference of guilt was small. Cf. *Kotteakos* v. *United States*, 328 U.S. 750, 772-773. There was no serious possibility of confusion on the part of the jury, as the evidence against each petitioner was clearly delineated and impressive. *United States* v. *Berling*, 324 F.2d 249, 253 (C.A. 7), certiorari denied, 376 U.S. 955.

Furthermore, the evidence clearly sustained the inference that petitioners engaged with the other de-

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[2] The court instructed (Tr. 535-536):

> Secondly, there was considerable testimony which I permitted in evidence on the representation that the government was going to connect it later on. This related generally to the conspiracy count, which is no longer in the case, and to a large extent related to conversations that Mr. Pitts had with Manin, sometimes called California, and conversations with Mr. Cogdell and also related to conversations that Cogdell had with Pitts and Manin.
>
> If the government had proved the conspiracy, according to the way I understand the law, the conversations by conspirators could be admissible against all the conspirators even though they were not present. But since I have dismissed the conspiracy you must disregard that testimony and consider only the testimony that relates to specific defendants and only those conversations had with a specific defendant and in that defendant's presence. Now, this does not exclude any conversations that Mr. Pitts or Mr. Cogdell made with the defendant Elgisser as long as you remember that it can be considered by you only with regard to the defendant Elgisser and not relating to Gladstein. It also does not exclude any conversations Pitts or Cogdell had with the defendant Gladstein, but you must consider that such conversations are to be considered by you only with regard to Gladstein and not with regard to Elgisser.

fendants in an illegal conspiracy, the only question being whether the agreement contemplated a violation of federal law. In these circumstances, the agency of each to act and speak for the others in the execution of the common plan did not depend upon a formal charge of conspiracy and limiting instructions were not, in fact, necessary: *United States* v. *Sapperstein*, 312 F.2d 694, 698 (C.A. 4); *United States* v. *Olweiss*, 138 F.2d 798, 799 (C.A. 2), certiorari denied, 321 U.S. 744.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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